dismissing the action was unquestionably right. That being so, we do not think it was a correct exercise of his discretion when he recalled the order and withdrew it and then allowed the plaintiff to amend the statement of claim.

In our judgment, an order which has not yet been perfected can be withdrawn, or altered, or modified only if to perfect it as orally pronounced would result in an erroneous order.

For the reasons which we have given, the appeal is allowed and the plaintiff's claim against the first defendant dismissed with costs. The order directing the first defendant to pay to the plaintiff the costs payable by the plaintiff to the second defendant is set aside. The plaintiff will pay the costs of this appeal to the first defendant and the second defendant, a person affected by these proceedings.

Appeal allowed.

Solicitors: *Rodyk & Davidson; Laycock & Ong.*

WONG MING KIONG v. CHOH JIN & ORS.

[C.A. (Thomson C.J., Hill and Good JJ.A.) August 31, 1961]

[K.L. — F.M. Civil Appeal No. 73 of 1960]

Negligence — Running down case — Collision between omnibus and cyclist — Duty to avert accident.

Evidence — Question of credibility.

In this case there was a collision between an omnibus and a cyclist. It was contended on appeal that the learned trial Judge should have found that the omnibus driver saw the cyclist at a time when he could have averted the accident.

Held: the question whether the driver saw the cyclist was primarily a question of credibility, although in assessing credibility the question of inherent probability must also arise. The learned trial Judge clearly preferred the evidence of the omnibus driver as a matter of credibility to that of the cyclist. The evidence of the driver was consistent with all the probabilities of the case and the appeal must therefore be dismissed.

Case referred to:—

(1) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142, 143.

COURT OF APPEAL.

S. P. Seenivasagam for the appellant.

P. Mooney for the respondent.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Mr. Justice Ong in a running down case. It is perhaps significant to observe that the incident from which the case arose took place in November 1957 and the case itself was not tried until December 1960, that is over three years later.

The case arose out of an incident which occurred on the morning of 10th November, 1957, at Simpang Lima, Klang, which is what is popularly known as a roundabout, on the main road leaving Klang for Port Swettenham. There and then there was a collision between an omnibus belonging to the second respondent and driven by the first respondent, who was the servant of the second respondent and engaged in his ordinary business on the one side and on the other side by the appellant a young man who at the material time was riding a bicycle.

It is common ground, I think, that the appellant, accompanied by two playmates, entered the roundabout from the direction of Klang town with the intention of leaving it by Jalan Raja West. Some time after the appellant had entered the roundabout, he crossed over the road from the outer perimeter of the roundabout to the inner perimeter. I think it is further agreed that this was a very dangerous and a very risky thing to do. While he was performing this manoeuvre he was overtaken and run down by an omnibus driven by the first respondent, and it is said, I hope this is not putting the appellant's case unfairly, that the consideration that the appellant, the cyclist, behaved negligently led the trial Judge to overlook the fact that there was also negligence on the part of the omnibus driver and that that negligence was similar to that in the case of *Daly* v. *Liverpool Corporation.*(1)

What happened in *Daly's* case, which was a case where a motor-bus ran down a pedestrian while crossing a busy street in Liverpool, was thus stated by Mr. Justice Stable:—

> "He (that is the bus driver) saw the plaintiff at a time when he could have averted this accident."

It was urged upon us that in the present case the trial Judge should have found that the omnibus driver saw the cyclist at a time when he could have averted the accident and if that was so it followed from what was said in *Daly's* case that the respondents were liable for negligence.

In the present case the question of when the driver saw the cyclist is primarily a question of credibility although, of course, in assessing credibility the question of inherent probability must also arise. It is perfectly clear that the trial Judge who heard the evidence of the cyclist and his playmates on the one hand and who heard the evidence of the driver on the other hand preferred the evidence of the driver. What the driver said was this (I am reading from his examination in chief and I do not think anything here was shaken in cross-examination):—

> "As I reached the roundabout I looked to my right, saw road clear, changed down from top to 3rd gear, and then proceeded, at about 15 m.p.h."

Here I would observe there was nothing improper as that would be the normal way of dealing with a heavy vehicle in the circumstances. He went on:—

"As I negotiated the roundabout one cyclist crossed my path from my left towards my right. When the cyclist was 6 to 7 ft. from me he crossed my path at an angle. I saw no signal given by him. I was unable to stop."

That is the evidence of the driver which the trial Judge clearly preferred as a matter of credibility to that of the cyclist. It is consistent with all the probabilities of the case. It is consistent with the damage suffered by the plaintiff, with the damage suffered by the bicycle and with the marks found on the omnibus.

In all the circumstances for myself I do not think we would be justified in interfering with the results at which the trial Judge arrived and I would dismiss the appeal with costs.

Hill and Good JJ. A., concurred.

Appeal dismissed.

Solicitors: *Seenivasagam & Son; Bannon & Bailey.*

SHARMA v. SINNAMA

[A.C.J. (Hepworth J.) September 1, 1961]

[Penang — Civil Appeal No. 6 of 1961]

Landlord and tenant — Recovery of possession — Control of Rent Ordinance, 1956, s.12(1)(f) — Hardship — Availability of alternative accommodation.

A landlord claiming possession under section 12(1)(f) of the Control of Rent Ordinance, 1956 must claim possession *bona fide* and on grounds which are not capricious and he must satisfy the Court that he reasonably requires the premises for his own occupation. The burden of proof then shifts on to the tenant to show that greater hardship would be caused by granting an order for recovery of possession than by refusing it. If the Court is left in doubt where the greater hardship lies, the landlord's claim will succeed.

In this appeal, the appellant contended that the learned Magistrate had not properly considered whether other accommodation was available for the respondent landlord when deciding the question of hardship.

Held: the respondent had established that she reasonably required the premises for her own use. It was true that she had taken no steps to find alternative accommodation but if there was suitable alternative accommodation available to her it was for the appellant to lead evidence to that effect. It was not open to the appellant to claim that because respondent had not sought alternative accommodation she was not entitled to an order, for though the availability of other accommodation is an important consideration, it is not the only consideration that a Court has to take into account.

Cases referred to:—

(1) *Booth* v. *Clive* 138 E.R. 327.

(2) *Cobb* v. *Lane* [1952] 1 All E.R. 1200.

(3) *Robinson* v. *Donovan* [1946] 2 All E.R. 731 at 732.

(4) *Sims* v. *Wilson* [1946] 2 All E.R. 261.

(5) *Coplans* v. *King* [1947] 2 All E.R. 393.

(6) *T.A.M. Abdul Aziz & Co.* v. *Shamsudeen Mohamed John* [1951] M.L.J. 141.

(7) *Kelley* v. *Goodwin* [1947] 1 All E.R. 811 at 812, 813.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

S. Thillaimuthu for the respondent.

Cur. Adv. Vult.

Hepworth J.: This is an appeal from the judgment of the Magistrate, Penang, awarding possession of premises No. 33, Selama Road, Penang, to the plaintiff under the provisions of section 12(1)(f) of the Control of Rent Ordinance, 1956.

The relevant parts of section 12(1)(f) of the Ordinance read as follows:—

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

.....

(f) where the owner of the premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust and—

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the Court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:....."

I do not propose to go into the facts in detail nor do I propose to set out in detail the arguments of learned Counsel for the appellant. Suffice it to say that the main ground of appeal was that the Magistrate had not properly considered whether other accommodation was available for the owner or the tenant when deciding the question of hardship, and in this connection had taken into account facts of whose existence there was no evidence.

The expression "reasonably requires" in section 12(1)(f) means that a landlord must be claiming possession *bona fide* and on grounds which are not capricious (*Booth* v. *Clive*).[1] It is not for the Court to consider whether it is reasonable to make the order claimed. On this point section 12(1)(f) differs from section 12(1)(b) or (k), and from Rent Restriction legislation in the United Kingdom which contains an overriding proviso that the Court must always consider whether it is reasonable to make the order.

The question of whether the respondent, the owner of the premises, reasonably required the same for her own occupation was not seriously contested. The onus was on her of satisfying